SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 17 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1052

STANLEY NICKOLICK,

Appellant,

vs.

STATE OF OHIO,

Appellee.

MOTION TO DISMISS AND MOTION TO AFFIRM

E. RAYMOND MOREHART
Prosecuting Attorney
Fairfield County, Ohio
Equitable Building
Lancaster, Ohio

TABLE OF CONTENTS

	Page
Motion to Dismiss	1
Motion to Affirm	2

TABLE OF AUTHORITIES

Pittsburgh Towing Company v. Mississippi Valley Barge Line Company, 385 US 32	1
State ex rel Jackman, 9 OS 2d 159	2
State v. Hill, 12 Ohio State 2d 88	3
Section 2945.50, Ohio Revised Code	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1052

STANLEY NICKOLICK,

Appellant,

vs.

STATE OF OHIO,

Appellee.

MOTION TO DISMISS AND MOTION TO AFFIRM

MOTION TO DISMISS

The appellee, State of Ohio, moves the Court to dismiss the within styled cause of action for the reason that the appellant has failed to comply with the time requirements of Supreme Court Rule 13 (1).

The judgment of the Supreme Court of Ohio in this case was entered on October 2, 1968. There was no motion for Rehearing. The Notice of Appeal was filed by the appellant in the Supreme Court of the United States on December 27, 1968. The case was docketed by the appellant on February 17, 1969, 46 days after the expiration of the 90 days provided by the rule. That during such extended period the appellant made no application for an extension or an enlargement of time nor did any explanation accompany the untimely docketing of the appeal.

This Court in *Pittsburgh Towing Company v. Mississippi Valley Barge Line Company,* 385 US 32, in its head note uses the following language:

> "An appeal will be dismissed by the Supreme Court of the United States for the appellant's failure to comply with the time requirements of Supreme Court Rule

13(1), where the case was not docketed nor the record filed until 22 days after the expiration of the 60-day period provided by the Rule, and during that period the appellant made no application for an enlargement of time nor did any explanation accompany the untimely docketing of the appeal, and it was only in its reply to the appellee's motion to dismiss that the appellant stated that the delay was occasioned by a misunderstanding between counsel for the appellant."

MOTION TO AFFIRM

The State of Ohio, appellee, moves the Court to affirm the judgment sought to be reviewed on appeal from the Supreme Court of Ohio on the ground that the decision is well based on substantial Ohio law and no Federal question is raised.

Section 2945.50 of the Ohio Revised Code which is sought to be reviewed in this matter was enacted in 1965 and the Supreme Court of Ohio has dealt with interpretations of that statute on two occasions since that time.

In *State ex rel Jackman, 9 OS 2d 159,* which is also referred to by the appellant in his brief, the Supreme Court of Ohio held that the provisions of Section 2945.50 of the Ohio Revised Code were constitutional. The Court then went on to talk about the discretion of the Court in the matter of "may grant". At page 167, the Court used the following language:

> "Rather that phrase means that the trial court must consider the merits of an application for a commission in accordance with certain rules that the law has already fashioned in the discovery area."
>
> • • •
>
> "The civil guidelines are available to the presiding judge in the trial of criminal cases, Section 2545.41 of the Revised Code. He is clothed with the same discretion as is the judge in a civil case."
>
> • • •
>
> "Moreover, in the light of Sections 2945.51, 2945.52, 2945.53 and 2945.54 of the Revised Code—all of which concern the possible payment of expenses out of the

treasury—*a trial court has the duty to determine whether, under the circumstances, the taking of depositions would serve the administration of justice.*" (Emphasis added)

In *State v. Hill 12 Ohio State 2d 88,* the Supreme Court of Ohio held in their syllabus that:

> "The allowance or overruling under Section 2945.50, Revised Code, of a motion to appoint a commissioner to take pretrial depositions in a criminal case rests within the sound discretion of the court, and, unless a plain abuse of that discretion is shown, no prejudicial error occurs".

In the body of the opinion itself Judge Zimmerman uses the following language:

> "First, the claim is made that the trial court committed reversible error in overruling defendant's motion to appoint a commissioner to take pretrial depositions under the provisions of Section 2945.50, Revised Code. Such motion was overruled for the stated reason "that said witnesses will be available to testify at time of trial one week from date."
>
> It will be noted that this statute provides, inter alia, that, "The court or a judge thereof may grant such commission." The overruling of the motion violated no due process provision of the state or federal constitutions and is largely a matter within judicial discretion. It seems apparent that counsel for defendant were aware generally of the testimony to be expected of the witnesses at the imminent trial, and that opportunity would then be given to thoroughly examine them. Reading between the lines, the thought suggests itself that the court may have concluded that the motion's objective was to conduct what is commonly termed a "fishing expedition." Moreover, there is no indication that the result of the trial would have been different had the depositions been taken."

The trial court made the following ruling on the motions referred to by the appellant:

> "The Court, on consideration of the same, finds that no legitimate reason has been advanced by the defendant, Stanley Nickolick, that would warrant the Court to grant permission to take the deposition of Leroy Alvis, Jr., and Thomas Smith, and that said applica-

tion and motion should be, and the same hereby is denied***."

The Fifth District Court of Appeals for Fairfield County, Ohio, in their opinion used the following language in affirming the action of the lower court:

> "The transcript and record show that the court did consider the merits of the application for a commission. The record shows also that at the trial both Leroy Alvis, Jr. and Thomas Smith were called as witnesses. The transcript shows that motion for the commission was filed just six days before the trial date and after the trial date had been set and counsel notified thereof. Opportunity was given to counsel to argue the motion for the commission but failed to appear at the hearing. Further opportunity was afforded defense counsel, to be heard in the absence of jury at the time of trial, as shown by the record, and defendant's counsel made no request therefor.
>
> "It is apparent from the transcript and record that these depositions if taken could never have been used in court. Their taking would have been a vain and useless thing. Their taking could have meant unnecessary public expense."

It does not appear from the rulings of the Supreme Court of Ohio in *State ex rel Jackman* case and in the *State vs. Hill* cases that there is any conflict between these decisions. The *Jackman* case established guide lines for the trial courts to follow and the *Hill* case basically said that there is no error if the trial court follows the guidelines unless there is a plain abuse of this discretion.

The appellant in the instant matter is asking this Court to consider an issue well settled in Ohio law which has been ruled on twice by the Supreme Court of Ohio and neither of said decisions are in conflict with the other.

Respectfully submitted,

.....

E. RAYMOND MOREHART
Prosecuting Attorney
Fairfield County, Ohio

CERTIFICATE OF SERVICE

I, E. Raymond Morehart, Attorney for Appellee, State of Ohio, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of March, 1969, I served a copy of the foregoing Motion to Dismiss and Motion to Affirm on George E. Tyack and Paul Scott, by mailing same to said counsel for Appellant by certified mail, postage pre-paid, return receipt requested.

.....

E. RAYMOND MOREHART
Prosecuting Attorney
Fairfield County, Ohio
Attorney for Appellee